MOHD. AMIN BIN MOHD. YUSOH

v.

TIMBALAN MENTERI HAL EHWAL DALAM NEGERI, MALAYSIA & ANOR

HIGH COURT MALAYA, TAIPING
DATO' HJ. ABDUL MALIK B. HJ. ISHAK J.
[CRIMINAL APPLICATION NO. 44-31 OF 1994]
22 SEPTEMBER 1994

ADMINISTRATIVE LAW*: Preventive Detention - Habeas Corpus - Applicant was detained for 2 years under s. 8(1) Internal Security Act 1960 (ISA) - Detention extended by service of second detention order under s. 8(7) of ISA - Second detention order did not specify the month when extension should proceed and no grounds stated - Whether second detention order null and void - Defects - Whether both orders should be read cummulatively or separately.*

INTERPRETATION :*Restrictive laws which deprived subjects of right to personal liberty - Strict construction - Fundamental rights of subject - Article 5 of Federal Constitution.*

This was an application by the applicant for a writ of *habeas corpus* in respect of a second detention order served on him for a further period of two years under s. 8(7) of the Internal Security Act, 1960. The facts showed that the second order therein did not specify the month when extension of detention should proceed and also failed to furnish any grounds for the detention. The primary issue that arose was whether such failures on the part of the detaining authority was fatal to the applicant's detention.

Held:

[1] The power to detain an individual especially the power to issue the second detention order must be expressed, at all times, in clear and unequivocal words.

[2] The failure to specify the month when the second detention order should start was bad in law and struck at the very core of Article 5 of the Federal Constitution. Consequently, this point should rightly be decided in favour of the applicant.

[3] There was a complete failure to comply with s. 8(7) paragraphs (a) or (b) or (c) of the Internal Security Act, 1960 and the proviso thereto as the applicant was not informed in the second detention order of the grounds of his detention. The second point should also rightly be decided in favour of the applicant and he should be given his libery forthwith.

[Applicant freed forthwith.]

Cases referred to:

Ex parte Johannes Choeldi & Ors. [1960] 26 MLJ 184 ***(refd)***
Walsh v. Secretary of State for India [1863] 10 HLC 367 ***(refd)***
Poh Chin Kay v. Menteri Hal Ehwal Dalam Negeri, Malaysia [1990] 2 MLJ 297 ***(foll)***
Attorney-General (Canada) v. Hallet Carey Ltd. [1952] AC 427 ***(refd)***
Hatton v. Beaumont [1977] 2 NSWLR 211 ***(refd)***
P.P. v. Koh Yoke Koon [1988] w MLJ 301 ***(foll)***
Tan Hoong Seng v. Minster for Home Affairs, Malaysia Anor [1990] 1 MLJ 171 ***(foll)***
Ng Hong Choon v. Timbalan Menteri Hal Ehwal Dalam Negeri dan 1 Lagi CLJ JT(39) 1994 ***(foll)***
Kanu Sanyal v. District Magistrate, Darjeeling and Others [1973] AIR SC 2684 ***(refd)***

Legislation referred to:
Internal Security Act, 1960 (Act 82), ss. 8(1), 8(7), 11(2)(b)

Other sources referred to:
Constitutional Law, 8th edn., p. 492
Corpus Juris Secundum, Vol. 39, p. 659, para. 9

For the applicant - Karpal Singh; M/s. Karpal Singh & Co.
For the respondents - Mahmud bin Hj. Abdullah, Federal Counsel, Ministry of Home Affairs.

JUDGMENT

Hj. Abdul Malik Hj. Ishak J:
The applicant was detained for a period of two years commencing from 16 April 1992 ("the first detention order") under s. 8(1) of the Internal Security Act, 1960 (Act 82) ("ISA"). In compliance with s. 11(2)(b) of the ISA, the applicant was on the same day served with a copy of the order furnished with a written statement of the grounds and allegations of fact. Suffice for me to say, for the purpose of this exercise, that the grounds and allegations of fact portrayed, *inter alia*, the applicant to be responsible for forging Malaysian identity cards and expediting the flow of illegal immigrants into Malaysia - nefarious activities prejudicial to the security of Malaysia. On expiry of the first detention order, the Timbalan Menteri Hal Ehwal Dalam Negeri saw it fit to extend it for a further period of two years ("the second detention order") under s. 8(7) of the ISA. The second detention order under s. 8(7) of the ISA reads thus (the relevant portions only):

> Dan bahawasanya saya adalah berpuashati bahawa dengan tujuan hendak mencegah orang yang tersebut di atas dari bertindak dengan apa-apa cara yang memudaratkan:
>
> (a) keselamatan Malaysia
> (b) (deleted)
> (c) (deleted)
>
> adalah perlu bahawa tempoh Perintah Tahanan itu dilanjutkan.
>
> Maka, oleh yang demikian, pada menjalankan kuasa yang diberi kepada saya oleh seksyen 8(7) Akta Keselamatan Dalam Negeri 1960, saya, Menteri Hal Ehwal Dalam Negeri, Malaysia, dengan ini Mengarahkan bahawa orang tersebut di atas itu hendaklah ditahan selama tempoh **dua** tahun selanjutnya mulai dari tarikh tamat tempoh Perintah Tahanan itu, iaitu dari 16 haribulan ..... 1994 di Tempat tahanan Kamunting,Taiping atau di mana-mana tempat lain yang diarahkan oleh saya dari semasa ke semasa.
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> Diperbuat pada 11 haribulan April 1994.
>
> (Tandatangan)
> (Dato' Megat Junid bin Megat Ayob)
> Timbalan Menteri Hal Ehwal Dalam Negeri Malaysia

In signing the second detention order under s. 8(7) of the ISA, the Timbalan Menteri Hal Ehwal Dalam Negeri, Malaysia was exercising the delegated powers of the Minister under Article 43A of the Federal Constitution.

Mr. Karpal Singh argued on behalf of the applicant that the second detention order under s. 8(7) of the ISA was bad in law because **it did not specify the month** when the extension should proceed from and there was also failure to specify on what grounds the second detention order was made. These defects would, it was submitted, render the second detention order to be null and void and consequently, the applicant was entitled to his liberty.

Encik Mahmud bin Hj. Abdullah, the learned Federal Counsel for the defendants, argued that the Court should look at these two orders cummulatively and not separately and in so doing the whole

scenario of the facts would be presented cohesively as to render the second detention order to be valid in law.

At the outset, it is pertinent to point out that at the reverse portion of the second detention order, Encik Mohd. Khairy bin Haji Said, the Penguasa Penjara, Tempat Tahanan Perundangan, Taiping affirmed and signed a short declaration that he had served the second detention order to the application on 15 April 1994. The applicant also signed at the bottom portion of the same page wherein he admitted receiving the second detention order and below it, written by hand, were written the date and time to be 15 April 1994 @ 15.35 hrs. Encik Mahmud bin Hj. Abdullah took upon himself the date 15 April 1994 to be the relevant date wherein the first detention order had expired and argued by necessary inference that the month that was left blank in the second detention order should rightly be the month of April.

It is now trite law that the applicant in a habeas corpus application is entitled to take advantage of any technical defect or imperfection which has the effect of invalidating the second detention order under s. 8(7) of the ISA. Rigby J. in *Ex parte Johannes Choeldi & Ors.* [1960] 26 MLJ 184 especially at page 186 succinctly phrased it as follows:

> The distinction, no doubt, is a highly artificial one. But this is an application for a writ of habeas corpus, and the applicants in matters which concern their personal liberty, are entitled to avail themselves of any technical defects which may invalidate the order which deprives them of that liberty.

It is a recognised principle of interpretation that laws which curtailed the rights of the subjects should be construed strictly bearing in mind the subjects fundamental rights to freedom as enshrined in Article 5 of the Federal Constitution; and that such laws must be interpreted to give accord, respect and recongnition of such rights (*Walsh v. Secretary of State for India* [1863] 10 HLC 367).

On perusal of the second detention order, I am constrained to hold that it had been made without the care and consideration normally associated with the concept and the spirit of good faith. The Timbalan Menteri Hal Ehwal Dalam Negeri when signing the second detention order cannot be said to have been "satisfied" as the product was made in a casual and cavalier fashion. Without the month being specified in the second detention order, the concept of inference as submitted by Encik Mahmud bin Hj. Abdullah cannot be used to validate the second detention order. The power to detain an individual especially the power to issue the second detention order must be expressed, at all times, in clear and unequivocal words. On this point, I need the quote the sage observations of Hashim Yeop A. Sani C.J. Malaya (as he then was) in the case of *Poh Chin Kay v. Menteri Hal Ehwal Dalam Negeri, Malaysia* [1990] 2 MLJ 297. His Lordship had this to say:

> We are fully conscious of the government's effort to combat the drug menace in this country. But there is a fundamental principle involved here. The power to detain a person without trial cannot be exercised by inference. The power must be expressed, clear and unequivocal. Where detention law and the liberty of the individuals are concerned, this is the most correct approach for the Courts to apply. There is hardly any need to repeat what has been said on the principle to be followed by the Courts in dealing with detention law.

In the circumstances, the failure to specify the month when the second detention order should start was bad in law and struck at the very core of Article 5 of the Federal Constitution. Surely the defendant whose personal liberty was about to be deprived the second time round has the right to be notified, in the most authentic manner, the second detention order which has been made against him. Consequently, this point should rightly go to the defendant.

In regards to the second point advanced by Mr. Karpal Singh that there was a blatant failure on the part of the detaining authority to specifically comply with s. 8(7) (a) or (b) or (c) and the proviso thereto to the ISA, one feature that springs to the forefront is this: the defendant must first be made to know on what grounds the second detention order was made. Section 8(7) of the ISA as follows:

> The Minister may direct that the duration of any detention order or restriction order be extended for such further period, not exceeding two years, as he may specify, and thereafter for such further periods, not exceeding two years at a time, as he may specify, either:
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> (a) on the same grounds as those on which the order was originally made;
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> (b) on grounds different from those on which the order was originally made; or
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> (c) partly on the same grounds and partly on different grounds:
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> Provided that if a detention order is extended on different grounds or partly on different grounds the person to whom it relates shall have the same rights under s. 11 as if the order extended as aforesaid was a fresh order, and s. 12(1) shall apply accordingly."

Section 11 of the ISA enacts as follows:

> 11 (1) A copy of every order made by the Minister under s. 8(1) shall as soon as may be after the making thereof be served on the person to whom it relates, and every such person shall be entitled to make representations against the order to an Advisory Board.
>
> (2) For the purpose of enabling a person to make representations under subsection (1) he shall, at the time of the service on him of the order -
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> (a) be informed of his right to make representations to an Advisory Board under subsection (1); and
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> (b) be furnished by the Minister with a statement in writing
>
> (i) of the grounds on which the order is made;
>
> (ii) of the allegations of fact on which the order is based; and
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> (iii) of such other particulars, if any, as he may in the opinion of the Minister reasonably require in order to make his representations against the order to the Advisory Board.
>
> (3) (not relevant).

Whereas s. 12(1) of the ISA enacts as follows:

> Whenever any person has made any representations under s. 11(1) to any Advisory Board, the Advisory Board shall, within three months of the date on which the representations are received by it, or within such longer period as the Yang di-Pertuan Agong may allow, consider the representations and make recommendations thereon to the Yang Di Pertuan Agong.

On perusal of the second detention order, there was a complete failure to comply with s. 8(7) paragraphs (a) or (b) or (c) of the ISA and the proviso thereto. The defendant was not told in the second detention order of the grounds of his detention. The defendant must be made to know the grounds of his detention so that he could decide whether he should exercise his inherent right under s. 11 of the ISA by treating the second detention order as a fresh order and consequently make representations to the Advisory Board as envisaged under s. 12(1) of the ISA. Put in another way, since the defendant was not furnished with the statement of the grounds on which the second detention order was made and the allegations of fact on which the second detention order was made, it would render nugatory the rights specially conferred on him by those provisions. Furthermore, the right of making representations to the Advisory Board would be rendered meaningless if the applicant was not in a position to know the grounds on which the second detention order was made.

Incidentally, the very fact the Timbalan Menteri Hal Ehwal Dalam Negeri, Malaysia found it necessary to affirm an affidavit to the effect that " "Pada 11hb April 1994 saya telah membuat perlanjutan Perintah Tahanan di bawah s. 8(7) Akta yang mengarahkan supaya tahanan terhadap pemohon yang ada sekarang dilanjutan selama dua tahun mulai 16hb April 1994 di atas alasan-alasan yang sama yang atasnya perintah itu dibuat" almost five months after signing the second detention order brings home clearly the denial to the applicant of his right to know on what grounds he was continuing to be detained so as to enable him to decide whether or not to exercise his constitutional right to make representations to the Advisory Board.

What am I supposed to do in construing Parliament's intention to the above quoted provisions of the ISA? I need, I think, only to give effect to the object and intent of Parliament in enacting those provisions. As was said by Lord Radcliffe "...every statute is to be expounded according to its manifest and express intention."*(Attorney-General (Canada) v. Hallet Carey Ltd.* [1952] AC 427). It was also said in *Hatton v. Beaumont* [1977] 2 NSWLR 211 that:

> The function of the Court ... is to give effect to the intention of the legislature. This it may do without difficulty where it appears from the terms of the legislation that the legislature directed its attention to the question and expressed an intention upon the effect to be given to the particular provision. But in most cases ... such an intention is not expressed and the Court's task is, by the application of the appropriate principles, to divine or impute that intention.

The then Supreme Court of Malaysia have repeatedly demonstrated in a number of judgments the need to apply a strict interpretation on laws which curtail the liberty of the subjects. The provisions of the ISA as discussed above would clearly curb the liberty of the subjects and therefore it should be strictly interpreted and, in the event of any doubt, such doubt must be given to the subjects. Thus, in*P.P. v. Koh Yoke Koon* [1988] 2 MLJ 301, Hashim Yeop A. Sani SCJ (as he then was) had occasion to say that:

> Detention not in accordance with law is inconsistent with the fundamental right guaranteed under article 5(1) of the Federal Constitution. Where a law deals with detention, there are abundant authorities to show that the provisions of such law must be construed strictly and, in the case of doubt, the Court should lean in favour of the subject.

Again, Hashim Yeop A. Sani in his capacity as C.J. (Malaya) (as he then was) said in *Tan Hoong Seng v. Minster for Home Affairs, Malaysia Anor* [1990] 1 MLJ 171:

> The law of preventive detention must be construed strictly and in the case of doubt the Court should lean in favour of the subject.

For these reasons, the second point should also rightly go to the defendant and he should be given his liberty forthwith.

This, however, is not the end of the matter. There is another point which Mr. Karpal Singh raised and this was in relation to the production of the body of the application before this Court before he is to be set free. Mr. Karpal Singh relied on a passage that appeared *per curiam* in the case of *Ng Hong Choon v. Timbalan Menteri Hal Ehwal Dalam Negeri dan 1 Lagi*CLJ J*T*(39) 1994 where Wan Yahaya bin Pawan Teh SCJ speaking for the Supreme Court said:

> It is further ordered that the detainee, Ng Hong Choon be produced forthwith before this Court to be set free.

Accordingly, on the strength of this authority, I made an order to that effect. On reflection, having given the matter anxious consideration, I am of the considered view that the notion that the Court cannot proceed to inquire into the legality of the detention unless the body of the person alleged to be wrongfully detained was produced before the Court was founded on the old English practice

and procedure. But the modern English practice and procedure in an application for a writ of habeas corpus has lucidly been described by Wade and Phillips in **Constitutional Law** (8th edition) at page 492 in the following terms:

> If *prima facie* grounds are shown, the Court or Judge ordinarily directs that notice of motion be given or a summons issued. Argument on the merits of the application then takes place on the day named. If the Court decides that the writ should issue, it orders the release of the prisoner or the handing over of the infant to the applicant, and this order is sufficient warrant, for the release. Under this practice there is no need to produce the prisoner in Court at the hearing and no return to the writ is actually made.

In the United States too, the present trend is for the non-production in Court of the person detained unless the Court deems his presence necessary. The Indian Supreme Court in *Kanu Sanyal v. District Magistrate, Darjeeling and Others* [1973] AIR SC 2684 quoted with approval a passage appearing in **Corpus Juris Secundum**, volume 39, page 659, paragraph 93 to the following effect:

> In general the body of the person detained must be produced with the writ; but production in Court of the person detained is not a pre-requisite to jurisdiction and in a proper case may be excused or dispensed with.

The modern practice in England to the effect that the production of the body of the person detained is not a basic or essential or pre-requisite requirement of a proceeding for a writ of *habeas corpu*s must be vigorously applied in our country. After all, to quote the sage observations of Bhagwati J. in *Kanu Sanyal's* case (*supra*): "Why should the ghost of the past - and that too not ours but that of another country - allowed to continue to haunt us and cloud our vision of rationality?" These words ring true for Malaysia too. In the process of developing our own common law, why must we turn to the old English practice and procedure for guidance. The time is now ripe for us to develop our own common law with a Malaysian flavour.